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# Bitterrooters for Planning, Inc. v. Montana Department of Environmental Quality

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***Bitterrooters for Planning, Inc. v. Montana Department of Environmental Quality*, 2017 MT 222, 388 Mont. 453, 401 P.3d 712**

**Rebecca Newsom**

In *Bitterrooters for Planning, Inc. v. Montana Department of Environmental Quality*, the Montana Supreme Court found that the Montana Department of Environmental Quality did not violate the Montana Environmental Policy Act when the department issued a wastewater discharge permit for a large retail merchandise store. This decision enforced a narrow interpretation of agency requirements under the Montana Department of Environmental Quality Act, focusing only on direct effects with a close causal connection to the agency action.

**I. INTRODUCTION**

The Montana Environmental Policy Act (“MEPA”) sets forth procedural requirements requiring an agency to “take a hard look” when contemplating any agency action that may impact the human environment.<sup>1</sup> MEPA’s “hard look” requirement is not expressly laid out and often left to agency discretion.<sup>2</sup> MEPA requires that an agency produce a formal environmental impact statement (“EIS”) if the contemplated action will “significantly affect the quality of the human environment” as determined by a preliminary environmental assessment (“EA”).<sup>3</sup> If the EA determines no possible significant effects, no EIS is required.<sup>4</sup> MEPA also mandates agency evaluation of cumulative impacts “when appropriate,” but does not specify how this evaluation should be done.<sup>5</sup> Since MEPA is modeled after the National Environmental Policy Act (“NEPA”), Montana courts generally find federal guidance persuasive in interpreting similar provisions of MEPA.<sup>6</sup>

In *Bitterrooters for Planning, Inc. v. Montana Department of Environmental Quality*, *Bitterrooters for Planning, Inc.* and *Bitterroot River Protective Association, Inc.* (collectively “Bitterrooters”) brought action against the Montana Department of Environmental Quality (“DEQ”).<sup>7</sup> Bitterrooters sought judicial review of an EA issued by DEQ

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1. *Bitterrooters for Planning, Inc. v. Montana Department of Environmental Quality*, 2017 MT 222, ¶ 17, 388 Mont. 453, 401 P.3d 712 (citing MONT. CODE ANN. §§ 75-1-102, 75-1-201(1), 75-1-220(5) (2017); quoting *Montana Wildlife Fed. v. Mont. Bd. of Oil & Gas Conserv.*, 2012 MT 128, ¶ 43, 331 Mont. 483, 133 P.3d 224).

2. *Id.* ¶¶ 17-18.

3. *Id.* ¶ 20 (citing MONT. CODE ANN. § 75-1-201(1)(b)(iv)).

4. *Id.*; see MONT. CODE ANN. § 75-1-102.

5. *Bitterrooters for Planning*, at ¶ 20.

6. *Id.* ¶ 18.

7. *Id.* ¶ 1.

regarding DEQ's wastewater discharge permitting process, alleging the process violated MEPA.<sup>8</sup> Current landowners of the potential site also intervened seeking enforcement of administrative rules under the Montana Water Quality Act ("MWQA"), which required DEQ to identify the actual owner or operator before issuing a wastewater discharge permit for a contemplated facility.<sup>9</sup>

The Montana Supreme Court determined that DEQ did not violate MEPA by issuing the Montana groundwater pollution control system ("MGWPCS") permit because DEQ adequately considered all water-quality-related environmental impacts of the construction and operation of the contemplated facility.<sup>10</sup> The Court held that secondary non-water-related impacts of issuing a MWQA permit did not fall within DEQ's lawful authority and thus did not require consideration in the agency's EA.<sup>11</sup> However, the Court also held that DEQ violated the standard requirement that a MGWPCS permit application disclose the actual owner or operator of the contemplated facility seeking said permit.<sup>12</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

On April 3, 2014, an engineering firm in Columbus, Ohio applied to the Montana DEQ for a MGWPCS permit to discharge wastewater into groundwater on a potential commercial development site near Hamilton, Montana.<sup>13</sup> The application contained nearly all standard information required by DEQ for issuance of a MGWPCS permit.<sup>14</sup> However, the application did not identify the potential facility name or its actual potential owner or operator.<sup>15</sup> DEQ requested the missing information, but the applicants responded only by reiterating that the facility name was "Parcel #698800" and Lee Foss would be the party responsible for adherence to the permit.<sup>16</sup> However, Foss undisputedly did not intend to actually own or operate the facility, but rather use the permit to enable sale of the property and then transfer the property to an unknown third party.<sup>17</sup>

In addition to the unidentified owner or operator in the application, Bitterrooters also argued that DEQ did not adequately follow MEPA procedures.<sup>18</sup> By May 2014, DEQ issued a draft EA concluding that "the contemplated wastewater discharge would not exceed applicable water quality standards and thus would have no significant

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8. *Id.*  
 9. *Id.* ¶ 13.  
 10. *Id.* ¶ 35.  
 11. *Id.*  
 12. *Id.* ¶ 44.  
 13. *Id.* ¶ 2.  
 14. *Id.* ¶ 3.  
 15. *Id.*  
 16. *Id.* ¶ 6.  
 17. *Id.*  
 18. *Id.* ¶ 13.

adverse effects [on] the human and physical environment.”<sup>19</sup> The draft EA found that construction of the facility “would have the potential” to impact various standard human environmental checklist factors, but found “no significant adverse impact.”<sup>20</sup> After an extended public comment period, during which DEQ responded to all relevant inquiries while avoiding substantial amendments to the EA, DEQ released a final EA, fact sheet, and issued the MGWPCS permit to Foss.<sup>21</sup> DEQ emphasized in the final EA that under MEPA, DEQ had “limited authority to regulate groundwater discharges to ensure the protection of the beneficial uses of state waters and compliance with the applicable *water quality standards*.”<sup>22</sup> Hence, the only significant change made to the EA after the public comment period was a lowered “permissible level of phosphorous discharge from the proposed wastewater treatment facility.”<sup>23</sup> DEQ noted that they were obligated only to respond to comments regarding the groundwater discharge, adequacy of the owner or operator self-monitoring the facility, and down-gradient water quality monitoring.<sup>24</sup> DEQ did not respond to the majority of public concerns raised because they were non-water-quality-related impacts, and thus “beyond the scope” of DEQ’s EA analysis.<sup>25</sup>

In turn, Bitterrooters petitioned the Montana First Judicial District Court for judicial review, alleging that DEQ’s wastewater discharge permit issuance process violated MWQA, MEPA, and Montana’s Constitutional right to public participation in governmental deliberations.<sup>26</sup> The district court granted summary judgment for Bitterrooters, finding that DEQ violated MWQA, MEPA, and Montana Administrative Rules of Procedure.<sup>27</sup> DEQ appealed the ruling, contending that it adhered to MEPA because it considered water quality impacts and had no further obligation to consider construction and operation of the potential facility.<sup>28</sup>

### III. ANALYSIS

The Montana Supreme Court reviewed DEQ’s environmental review under MEPA’s “arbitrary and capricious” standard.<sup>29</sup> In other words, an agency’s action will be upheld as long as it is lawful, unless the Court determines the action did not consider all relevant factors or

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19. *Id.* ¶ 8 (internal quotations omitted).

20. *Id.*

21. *Id.* ¶ 9.

22. *Id.* ¶ 12 (emphasis added).

23. *Id.* ¶ 10.

24. *Id.* ¶ 11.

25. *Id.*

26. *Id.* ¶ 13 (citing MONT. CONST. art. II, § 8; MONT. CODE ANN. § 2-3-101 (2017); Mont. Admin. R. 17.4.609(3)(d) (2017)).

27. The district court dismissed the right-to-participate claim due to the applicable statute of limitations. *Id.*

28. *Id.* ¶ 14 (emphasis added).

30. *Id.* (citing MONT. CODE ANN. § 75-1-201(6)(a)(iii)).

relied on faulty judgment.<sup>30</sup> MEPA states that “any contemplated agency action that may have an impact on the human environment,” triggers a mandatory environmental review by the agency.<sup>31</sup> If an EA finds no significant effects on the quality of the human environment, a formal environmental impact statement is not required.<sup>32</sup>

*A. MEPA Review of a Requested DEQ Groundwater Discharge Permit*

MEPA requires a state agency, “when appropriate, [to] evaluate the cumulative impacts of a proposed project.”<sup>33</sup> Due to the vagueness of the statute, the Montana legislature has instructed the Montana Board of Environmental Review (“BER”) to regulate the specific MEPA requirements for DEQ actions.<sup>34</sup> Under BER requirements, a preliminary EA must include “‘an evaluation of the impacts, including cumulative and secondary impacts,’ on the ‘physical environment’ and on the ‘human population in the area to be affected by the proposed action.’”<sup>35</sup> Criteria for reviewing secondary impacts of a proposed action also includes the phrase “where appropriate” and is listed in Admin. R. M. 17.4.609(3)(e).<sup>36</sup> The Court concluded that “where appropriate” language renders a section permissive, meaning secondary impacts must be determined only when the nature of the proposed state action calls for such evaluation.<sup>37</sup>

According to the Administrative Rules of Montana, the secondary impacts that must be included in the EA are defined as, “further impact[s] to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action.”<sup>38</sup> Since no Montana statute defines “direct impact,” the Court defers to NEPA, MEPA’s federal counterpart.<sup>39</sup> Under NEPA, “direct effects” are defined as “effects or impacts caused by the action . . . at the same time and place.”<sup>40</sup> In *Public Citizen*,<sup>41</sup> the U.S. Supreme Court rejected the Ninth Circuit’s but-for standard of causation, in which NEPA review is triggered merely because an environmental effect would not happen but for the agency’s action.<sup>42</sup> The Supreme Court instead held that NEPA has a “demanding causation standard,” and there must be “a reasonably close

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31. *Id.* ¶¶ 15-16.

32. *Id.* ¶ 17 (citing MONT. CODE ANN. §§ 75-1-102, 75-1-201(1), 75-1-220(5)).

33. *Id.* ¶ 20 (citing MONT. CODE ANN. § 75-1-201(1)(b)(iv)).

34. *Id.* ¶ 21 (quoting MONT. CODE ANN. § 75-1-208(11)).

35. *Id.*

36. *Id.* (quoting Mont. Admin. R. 17.4.609(3)(d)-(e) (2017)).

37. *Id.* ¶ 22.

38. *Id.*

39. *Id.* ¶ 24 (quoting Mont. Admin. R. 17.4.603(18)).

40. *Id.*

41. *Id.* ¶ 24 (citing 40 C.F.R. § 1508.8(a) (2017)).

42. *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

43. *Id.* ¶ 26 (citing *Public Citizen*, 541 U.S. at 758-62).

causal relationship between the subject government action and the particular environmental effect.”<sup>43</sup> In the present case, the Montana Supreme Court applied this demanding causation standard, holding that the construction and operation impacts of the contemplated facility were not direct impacts of the MGWPCS permit being issued, but instead the secondary impacts of the actual permitted activity.<sup>44</sup>

Additionally, the Montana Supreme Court emphasized that MEPA and NEPA require agencies to follow the procedural steps in completing environmental assessments, but give no additional regulatory authorization to those agencies.<sup>45</sup> Secondary impacts outside the state agency’s control thus do not need evaluation during permit review because they lack the “reasonably close causal relationship between the triggering state action and the subject environmental effect.”<sup>46</sup> MEPA requires state agencies to adequately consider only those effects that they have the authority to control.<sup>47</sup> The Court held that since the Montana legislature has not given DEQ authority over general land use control, DEQ does not need to consider environmental impacts other than those related to water quality and construction of the wastewater treatment facility.<sup>48</sup>

#### *B. Governing Requirements for MWQA Permits*

The Montana Supreme Court also held that under MWQA, a wastewater discharge permit issued by DEQ must contain identification of the actual owner or operator of the contemplated facility before the permit may be issued.<sup>49</sup> The Court emphasized that MWQA, not MEPA, governs whether a MWQA application contains all necessary information to allow permit issuance.<sup>50</sup> DEQ is obligated under MWQA to follow BER wastewater discharge rules.<sup>51</sup> The rules mandate that “the owner or operator of any proposed source . . . which may discharge pollutants into state ground waters shall file a completed MGWPCS permit application.”<sup>52</sup> Since it is undisputed that the name on the permit application—real-estate broker Lee Foss—is not the actual owner or operator of the proposed facility and an unknown third party would construct and operate the facility, DEQ violated BER rules when they issued the permit.<sup>53</sup>

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44. *Id.* ¶ 25 (citing *Public Citizen*, 541 U.S. at 767).

45. *Id.* ¶ 35.

46. *Id.* ¶¶ 41-43.

47. *Id.* ¶ 33.

48. *Id.* ¶¶ 33-34.

49. *Id.*

50. *Id.* ¶ 42.

51. *Id.* ¶¶ 41-42.

52. *Id.* ¶ 44.

53. *Id.* ¶ 42 (quoting Mont. Admin. R. 17.30.1023(3)).

54. *Id.* ¶¶ 43-44.

Consequently, the Court ordered DEQ to “identify and disclose the actual contemplated owner or operator of the facility for which the applicant seeks the subject wastewater discharge permit.”<sup>54</sup>

#### IV. CONCLUSION

The Court’s decision emphasizes that it will generally interpret MEPA narrowly. Agency actions will only be deemed subject to MEPA review if the environmental effects from the triggering agency action are within the legal control of the reviewing agency.<sup>55</sup> If the Montana legislature wants to fix the “environmental review gap” identified by the Montana Supreme Court, it must grant state agencies greater regulatory power, ideally allowing them to not only broaden the possible effects they may consider during procedural review, but also take concrete actions to mitigate or avoid such impacts. Otherwise, MEPA will not be able to adequately protect against cumulative hazardous environmental effects.

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55. *Id.* ¶ 44.

56. *Id.* ¶ 34.